No. 14575

In the United States Court of Appeals for the Ninth Circuit

OVETA CULP HOBBY, SECRETARY OF HEATH, EDUCATION, AND WELFARE, APPELLANT

v.

RALPH B. THORBUS, APPELLEE

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

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INDEX

	Page
1. The standard	1
2. The facts	5
3. The procedure	8
Conclusion	10

CITATIONS

Cases:	
Biber v. *O'Brien*, 138 Cal. App. 353, 32 P. 2d 425	7
Bowles v. *Seminole Rock & Sand Co.*, 325 U. S. 410	5
Edwards v. *City of Los Angeles*, 48 Cal. App. 2d 62, 119 P. 2d 370	7
Friedman v. *Shindler's Prarie House*, 224 App. Div. 232, 230 N. Y. S. 44, affirmed 250 N. Y. 574, 166 N. E. 329	9
Gerling v. *Baltimore & O. R. R.*, 151 U. S. 673	6
Heather Hall Corp. v. *Haines*, 90 F. Supp. 280 (D. Mich.)	7
Magner v. *Hobby*, 215 F. 2d 190 (C. A. 2)	6
Woods v. *Drolson*, 75 F. Supp. 758 (D. Minn.)	7
Statutes and Regulations:	
Social Security Act:	
Sec. 205 (g)	8
Sec. 211 (a) (2), 64 Stat. 502, 42 U. S. C. 411 (a) (2)	2
Sec. 211 (c), 64 Stat. 502, 42 U. S. C. 411 (c)	2
Social Security Regulation 4, Section 404.1052	1
Miscellaneous:	
A. L. I., *Model Code of Evidence*, Sec. 802	6
Black's Law Dictionary (4th ed. 1951) 121, 872	7
Cal. Code Civil Proc., Sec. 1875 (1949 ed.)	6
95 *Cong. Rec.* 13821, 13836, 13900, 13914, 13921, 13947, 13960–61	2
95 *Cong. Rec.* 13821, 13900, 13917, 13922, 13928, 13965	3
96 *Cong. Rec.* 8491, 8509, 8565, 8588, 8797, 8799–8810	2
96 *Cong. Rec.* 8588	3
H. Rep. 1300, 81st Cong., 1st Sess. 9–10	2
Sen. Rep. 1669, 1950 *Code Cong. Serv.* pp. 3288, 3299	2
Webster's New International Dictionary (2d ed. unabridged 1948) 122, 298, 1205	7

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REPLY BRIEF FOR APPELLANT

This reply brief is filed in answer to certain contentions made in the appellee's brief not covered by our main brief. We consider first the statutory and regulatory standard for determining Social Security coverage, next the applicability of the facts in this case to that standard, and finally the procedure involved in reviewing this determination by the Secretary.

1. *The Standard.* In his brief, appellee makes no contention that the administrative regulation (Social Security Regulation 4, Section 404.1052) is invalid as contrary to the language or purpose of the Social Security Act. Thus the only questions involved in

determining Social Security coverage, for the purposes of this case, are what meaning should be given to the regulation and whether the facts of this case entitle appellee to coverage within the regulation as thus interpreted.

Appellee urges that the intention of the statute and the regulation is to provide coverage for self-employed persons who put forward substantial personal effort in their form of employment. If such were the case, certainly the Act would establish coverage for farmers, doctors, lawyers, dentists, osteopaths, veterinarians, chiropractors, naturopaths, optometrists, Christian Science practitioners, architects, public accountants, funeral directors, professional engineers, holders of public office, and ministers. Yet persons deriving their income in any of these occupations are specifically excluded from coverage by the statute. Sec. 211 (a) (2), 64 Stat. 502, 42 U. S. C. 411 (a) (2); Sec. 211 (c), 64 Stat. 502, 42 U. S. C. 411 (c). An examination of the legislative history leading to the 1950 amendments, which establish coverage for self-employed persons, demonstrates that the exclusion of certain occupations from coverage was based on two considerations: (1) Congress was not convinced that a majority of the individuals in these occupations desired to be covered, and (2) Congress was determined to establish compulsory coverage with no option in the individual as to coverage, for all groups included. See Sen. Rep. 1669, 1950 *Code Cong. Serv.*, pp. 3288, 3299; H. Rep. 1300, 81st Cong., 1st Sess. 9–10; 95 *Cong. Rec.* 13821, 13836, 13900, 13914, 13921, 13947, 13960–61; 96 *Cong. Rec.* 8491, 8509, 8565, 8797,

8799–8810. The reasons why persons in the excluded occupations preferred not to be covered undoubtedly varied considerably between occupations and between the persons within each of them. Two reasons for the lack of interest in being covered were ascribed, by various Congressmen during the debates on the bill, to be (1) the people in these professions often had not had employees under their supervision from whose experience they could learn to appreciate the advantages of coverage, and (2) in these fields of endeavor it is common for men to continue working after passing 65 so that the benefits of coverage would often fall short of the forced contributions of Social Security taxes. See 95 *Cong. Rec.* 13821, 13900, 13917, 13922, 13928, 13965; 96 *Cong. Rec.* 8588.

It is quite conceivable that apartment house operators could have been motivated by either or both of these factors. An apartment house characteristically has few employees so that the former provisions of the Act, which denied coverage to employees in an establishment with less than eight workers, would have prevented most apartment operators from having any direct contact with the possible advantages of coverage. In the same way, it is not unusual for apartment house operators to continue their self-employment a considerable number of years after passing the age of 65. Indeed, reference to the facts in this particular case shows that appellee had only one employee, that he continued to receive income as an apartment house operator until he was 73 years old, and that he would have continued to derive income from this source even longer if it were not for circumstances

totally unrelated to his health and age. We submit, therefore, that appellee's contention that Congress intended to provide coverage whenever income is derived from substantial personal efforts is unfounded; the real basis for inclusion and exclusion was a belief by Congress that the majority of persons in appellee's field of employment do not desire coverage at this time.

In a similar vein, appellee contends that the provisions establishing coverage are remedial and ought to be liberally construed and that exceptions to coverage should be strictly construed so as to minimize the number of persons not covered. This contention, as applied to this case, denies the very basis for exclusion used by Congress. Appellee would, in effect, compel others in a similar position to pay Social Security taxes and to submit to coverage, even though Congress has determined that they do not desire coverage. It is not our contention that the Social Security Act, which is in part a taxing statute, should be strictly construed so as to limit its application to those clearly covered, as has been done in treating other tax statutes; rather we argue only that the fair intendment of the Act and regulations should be applied using the normal rules for reasonable construction.

Finally it should be remembered that the regulation here involved is the joint product of the Social Security Administration and the Treasury Department. Failure to give great weight to their interpretation of the regulation, as consistently applied to cases such as the present one, would ignore their common ex-

pertise in this field generally and in the treatment of this specific problem more particularly. Congress established the power of these two expert bodies to issue and apply regulations, and in that manner, it is often said, delegated a portion of its legislative authority. We do not suggest that the courts are absolutely bound to accept the administrative interpretation of its own regulation, but we do submit that the rejection of the joint administrative interpretation is a matter of some gravity and should not be done without substantial reason. See *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 ("But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.")

2. *The Facts.* Since the governing regulation provides that one who operates a hotel[1] is covered by Social Security but that one who operates an apartment is not, the crucial question would seem to be whether appellee's establishment was more like an apartment or a hotel within the meaning of the regulation. Appellee's brief sets forth at length the services which he states were performed at his establishment and which he claims clearly require a finding that it was more like a hotel than an apartment. These services and facilities are set forth and disposed of individually in appellant's brief at pp. 17–20. In his brief, appellee attempts to liken his situation

[1] Since the regulation treats boardinghouses and hotels as similar, varying perhaps in the grade of services and facilities provided, the two terms are used interchangeably in this brief.

to that of the nearby Los Angeles Statler Hotel by going outside the record to examine the comparable services and facilities provided.[2] Assuming, *arguendo,* that the facilities and services provided at the Statler Hotel had been presented to the administrative agency and that they therefore could be considered in this proceeding to review, there seems to be no substance to this comparison. A reading of the facts as set forth in appellee's brief (p. 13) merely emphasizes the fact that the Statler Hotel provides extensive personal services to its guests, including services rendered in the leased premises, while the Knickerbocker Apartments (appellee's establishment) rendered services primarily to the building and only incidentally to the occupants and rendered no services within the leased premises.

Passing from this single example to more general definitions of the two types of accommodations, we find that the normal distinctions made between a hotel and an apartment are that (1) a hotel room provides eating facilities, if at all, outside the rented room, while an apartment provides full housekeeping facilities including food preparation utilities, (2) a hotel provides extensive personal services to the

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[2] In this connection it is interesting to note that appellee's brief complains (pp. 28–29) that our principal brief unfairly relied upon the relevant provisions of the Los Angeles Municipal Code which do not appear in the record. Our intention was to suggest that the allegedly extensive services provided by appellee were in fact largely required by law. It is our understanding that the trial court and this Court are authorized to take judicial notice of such ordinances. Cal. Code Civil Proc., Sec. 1875 (1949 ed); *Gerling* v. *Baltimore & O. R. R.*, 151 U. S. 673; see A. L. I., *Model Code of Evidence*, Sec. 802.

guests, while an apartment house provides many fewer services of that type, (3) a hotel caters largely to transients, while an apartment house is conducive to longer tenancies, and (4) a hotel provides services within the leased premises, generally including maid service, while an apartment house leaves such domestic operations to the tenants.[3] These distinctions inevitably point to the conclusion that appellee's establishment was an apartment house. In any event, this is a question of fact which was resolved by the administrative ruling and which should not be upset, as discussed *infra,* unless unsupported by substantial evidence in the administrative record. Appellee finally suggests that the Knickerbocker Apartments is in reality a hotel for lower income classes, but it does not seem reasonable to explain away the vital differences between his establishment and a hotel on this theory. It may well be that there are boardinghouses available to persons in lower classes in the Los Angeles area which do not provide all the apartment-like facilities that appellee does (*e. g.,* stoves, ice boxes, etc.) but which do provide the missing hotel-like services. Or, on the other hand it may be that persons in these economic circumstances cannot and do not live in hotels.

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[3] Compare *Black's Law Dictionary* (4th ed. 1951) 121 ("apartment house") with *id.* at 872 ("hotel"); compare *Webster's New International Dictionary* (2d ed. unabridged 1948) 122 ("apartment house") with *id.* at 298 ("boardinghouse") and *id.* at 1205 ("hotel"); see also *Heather Hall Corp.* v. *Haines*, 90 F. Supp. 280 (D. Mich.); *Woods* v. *Drolson*, 75 F. Supp. 758 (D. Minn.); *Biber* v. *O'Brien*, 138 Cal. App. 353, 32 P. 2d 425; *Edwards* v. *City of Los Angeles*, 48 Cal. App. 2d 62, 119 P. 2d 370.

3. *The Procedure.* Sec. 205 (g) of the Social Security Act, set forth in appellant's appendix at pp. 24–25, limits the scope of review of the Administrator's findings of fact. "The findings of the Administrator as to any fact, if supported by substantial evidence shall be conclusive * * *." Appellee contends that the statutory rule is inapplicable here since the Administrator made no clear and unambiguous findings, and since the question involved is solely one of law. With respect to the former of these two arguments, it should be noted that the referee did make findings of fact, although appellee apparently considers them too vague to merit the protections of Sec. 205 (g). The referee set forth specifically the relevant facilities and services which he considered were performed (R. 34–35) and proceeded to apply these facts to the governing regulations (R. 35–38).[4] Furthermore, if appellee is correct in his contention that the administrator's findings were too vague to permit reasonable review, it was the district court's duty to remand the case to the agency with instructions to make more specific findings, rather than determining the facts for itself without reference to a previous administrative decision. Cf. *Magner* v. *Hobby,* 215 F. 2d 190 (C. A. 2). To do otherwise would challenge the very foundation of such well established legal doctrines as primary jurisdiction and exhaustion of administrative remedies, and would exceed the district court's statutory jurisdiction under Section 205 (g).

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[4] Reference to these findings was made in appellant's brief at p. 19, fn. 7.

Appellee also argues that the referee's findings, if sufficiently clear to permit review, are clearly erroneous since they do not include all of the services and facilities allegedly provided at the Knickerbocker Apartments. A requirement that the referee must accept every statement made by a claimant as true would effectively destroy the hearing procedure. It is the referee's function to listen to an *ex parte* presentation of a claimant's evidence, often without considering any contrary testimony, and to evaluate the reliability of that testimony, taking into account its reasonableness and the credibility of the claimant. In this sense the referee assumes the role of a trial jury, except that the referee is aided in his deliberations by his own extensive training and experience in the field involved.

Finally, appellee argues that no restriction on the courts' right of review exists in this case because the Administrator's determination was wholly one of law. It does not seem that the question whether appellee's establishment is more like an apartment than a hotel is an issue of law (cf. *Friedman* v. *Shindler's Prarie House,* 224 App. Div. 232, 236, 230, N. Y. S. 44, 49, affirmed 250 N. Y. 574, 166 N. E. 329), but even if it were it would be a question of interpreting and applying an administrative regulation. For the reasons stated *supra,* pp. 4–5, the administrative construction and application of its own regulation should be given great weight. This is doubly true where, as here, the regulation represents and is uniformly applied by two expert agencies.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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